Military Commissions Trial Judiciary
Guantanamo Bay, Cuba

UNITED STATES OF AMERICA v. KHALID SHAIKH MOHAMMAD, WALID MUHAMMAD SALIH MUBARAK BIN 'ATTASH, RAMZI BINALSHIBH, ALI ABDUL AZIZ ALI , MUSTAFA AHMED ADAM AL-HAWSAWI	**AE 013H** **Reply of the American Civil Liberties Union** to the Government's Response to the Motion for Public Access to Proceedings and Records **May 23, 2012**

1. Timeliness. This reply is timely filed pursuant to Military Commissions Trial Judiciary Rule of Court 3.7.d(2).

2. Overview. The government's response to the ACLU's motion for public access is remarkable both for what it leaves out and what it claims. The government fails to address the constitutional basis for the ACLU's motion—the public's First Amendment right to access these proceedings—which this commission must adjudicate, and which overrides any statutory provisions to the contrary in the Military Commissions Act of 2009. In order to adjudicate the public's First Amendment right of access, this commission must determine the propriety of the government's classification of detainees' own accounts of their experiences in government custody.

The classification authority the government continues to claim is legally untenable and morally abhorrent. There is simply no basis in law (and the government cites none) for the government to classify and suppress defendants' own accounts of an illegal government torture and detention program the whole purpose of which was to "disclose" the torture and detention to the defendants by subjecting them to it.

Even if this commission were nevertheless to find that the government's classification of some or all of defendants' own statements about government mistreatment is proper, it must still determine whether the government's broad request for presumptive closure of these proceedings meets the First Amendment right-of-access test. The closure the government seeks is not narrowly tailored, and may not be used to shield these crucially important proceedings from public view.

Courts' recognition of the public's First Amendment right of access to judicial proceedings is predicated on the need to ensure legitimacy of those proceedings in the eyes of the public. *See* ACLU Mot. 9–10. This commission is undoubtedly aware that there is a long-running debate, both in the United States and abroad, about the legitimacy and fairness of the entire commission system. That debate may not be ended or cured by the commission's decision on the government's request to classify and suppress the defendants' accounts of government misconduct. But it is a certainty that the commission will not be seen as legitimate if the proceedings have at their heart the government's judicially-approved censorship of the defendants' accounts of their torture.

3. Legal Basis for Relief Requested.

A. The First Amendment Protects the Public's Right of Meaningful Access to These Proceedings.

The government's reply does not address—and nor does it contest—the gravamen of the ACLU's motion: the public's right of access to these military commission proceedings is mandated by the First Amendment, and may only be overcome if the government presents evidence of a substantial likelihood of harm to an overriding government interest, and its requested closure of the proceedings is narrowly tailored. ACLU Mot. 5–11 (discussing First Amendment right of access and standard); Press

Objectors' Mot. 14–15. Although the government fails to grapple with the public's First Amendment rights at stake here, this military commission must.[1] Once the First Amendment right is raised and attaches, this commission must adjudicate it. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 609 n.25 (1982) ("[R]epresentatives of the press and general public 'must be given an opportunity to be heard on the question of their exclusion.'").

In order to apply the First Amendment right-of-access test, this military commission must determine whether the government's classification of detainees' own accounts of their detention, torture and other mistreatment is proper. *See* ACLU Mot. 12–17. For the reasons set forth in Section B below, it is not. Even if the military commission were to find that the government has somehow properly classified some or all of defendants' statements concerning their personal knowledge of their detention and mistreatment, it must still determine whether the government's proposed blanket closure of the public's access to all of defendants' testimony satisfies the First Amendment strict

[1] The government bases its opposition to the ACLU's motion on the right of access provisions in the Military Commissions Act of 2009 ("MCA") and the 2010 Manual for Military Commissions ("Manual"). Gov't Mot. 11–14; Gov't Resp. 7–10. When Congress enacted the MCA, it rightly recognized that commission proceedings must be open to the public, subject to narrow exceptions. 10 U.S.C. § 949d(c); *see also* ACLU Mot. 11–12. But the MCA's standard for closure has a lower threshold than the First Amendment standard. 10 U.S.C. § 949d(c)(2) (requiring military judge to make a "specific finding" that closure is necessary to protect information "which could *reasonably* be expected to cause damage to national security" (emphasis added)). The Supreme Court has squarely held that a statutory "reasonable likelihood" standard does not adequately protect the public's constitutional rights, and that the First Amendment requires a court to find that any harm asserted by the government meets a higher "substantial likelihood" standard. *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 13–14 (1986) ("*Press-Enterprise II*"); *see also Doe v. Gonzales*, 500 F. Supp. 2d 379, 411 (S.D.N.Y. 2007), *aff'd in part and rev'd in part sub nom, John Doe, Inc. v. Mukasey*, 549 F.3d 861 (2d Cir. 2008). To the extent the government's proposed protective order is based on MCA provisions derived from the Classified Information Procedures Act, Gov't Mot. 12–14, neither the MCA nor CIPA excuse this commission "from making the appropriate constitutional inquiry" under the First Amendment because the commission "may not simply assume that Congress has struck the correct constitutional balance." *In re Wash. Post Co.*, 807 F.2d 383, 393 (4th Cir. 1986).

scrutiny test. For the reasons set forth in Section C, the government cannot satisfy the First Amendment's searching requirements.

B. The Government Fails to Justify its Classification and Suppression of Defendants' Personal Accounts of Their Abuse and Mistreatment in Government Custody.

The ACLU has argued that the government lacks authority, under Executive Order 13,526, to classify the defendants' own accounts of their detention, torture and abuse, which the government coercively and illegally imposed upon them. Indeed, the government's ability to suppress the defendants' statements derives initially from the fact that the CIA illegally detained them *incommunicado*. *Cf.* CIA Office of the Inspector General, *Counterterrorism Detention and Interrogation Activities (September 2001 – October 2003)* (May 7, 2004), *available at* http://wapo.st/3JNHM ("IG Report") at 96 (finding, in a section entitled "Endgame," that the CIA "has an interest in the disposition of detainees and a particular interest in those who, if not kept in isolation, would likely divulge information about the circumstances of their detention"). The government's continued suppression of defendants' statements depends on its ability either to keep the defendants in indefinite detention or to impose the death penalty without defendants' accounts becoming public at their trial—if this commission so permits.[2]

The government mischaracterizes the ACLU's argument. The ACLU does not allege "that the government has no legal authority to make a presumptive determination that statements of the accused are classified pending review by an [Original Classification Authority]." Gov't Resp. 10. That characterization wrongly assumes the ACLU's

[2] Indeed, former prisoners who were subject to the CIA's illegal detention and torture program and were subsequently released have spoken publicly about their experience in CIA custody. The government could not silence them under any colorable legal theory. *See, e.g.*, Dana Priest, *Wrongful Imprisonment: Anatomy of a CIA Mistake*, Wash. Post, Dec. 4, 2005, http://wapo.st/eaM1RS (providing former CIA prisoner Khaled el-Masri's own account of his experience).

concern is only with the presumption of classification and not the classification itself. Rather the ACLU contends—and asks this commission to find—that the government does not have the legal authority to classify information that the government itself disclosed to defendants, who the government acknowledges were not authorized to receive classified information and would be under no obligation to keep silent about it. Gov't Resp. 11 (each defendant is an "accused who does not hold a security clearance and who owes no duty of loyalty to the United States").

The core argument the government makes in support of classification to this commission and in response to the ACLU is legally untenable. According to the government, "[b]ecause the Accused were detained and interrogated in the CIA program, they were exposed to classified sources, methods, and activities. Due to their exposure to classified information, the Accused are in a position to reveal this information publicly through their statements." Gov't Mot. 6; Gov't Resp. 10. The government fails utterly to explain how it has a legitimate interest, let alone a compelling one, in suppressing information about a CIA coercive interrogation and detention program that was illegal and has been banned by the President. *See* ACLU Mot. 21–24.

Even if the CIA program could properly be classified, the government cannot justifiably argue that it can also classify and suppress defendants' own accounts of their experiences because the government itself disclosed the program to defendants. Put another way, if the government is correct that the CIA's detention and interrogation program was properly classified, then it also follows that the very goal of the program was to disclose—deliberately, purposefully, and with authorization from the highest levels of government—classified information to individuals who the government

concedes were not authorized to receive it. Worse, the government disclosed classified information through coercion: it forced the defendants to acquire their knowledge of the secret methods of torture, abuse and confinement to which the government subjected them, the location of the secret foreign detention sites at which the government forcibly held them, and (to the extent defendants are aware of these) the identities of foreign and U.S. government agents who perpetrated abuses on the them.

The government's claimed authority to gag defendants goes far beyond any that the courts have found permissible under the First Amendment. Courts generally uphold the suppression of properly classified information in the face of a First Amendment challenge if there is a *voluntary* relationship of privity between the government and the individual in possession of classified information. ACLU Mot. 19–20 (citing cases). That is primarily the context in which the government's assertion that "[t]here is no First Amendment right to reveal properly classified information" applies. Gov't Resp. 11 (citing *Stillman v. CIA*, 319 F.3d 546, 548 (D.C. Cir. 2003) (former CIA employee could not publicly discuss information covered by non-disclosure agreements with CIA); *Snepp v. United States*, 444 U.S. 507 (1980) (CIA agent's employment agreement with Agency stipulated a relationship of trust, prohibiting him from publishing information about CIA activities without CIA review); *ACLU v. DOD*, 584 F. Supp. 2d 19, 25 (D.D.C. 2008) *vacated*, 664 F. Supp. 2d 72, 79 (D.D.C. 2009) (summary discussion finding no First Amendment right in Freedom of Information Act case)). It goes without saying that there has been no voluntary relationship, let alone a relationship of trust, between the government and the defendants to whom it disclosed classified information.

Indeed, even when properly classified national security information is leaked, the Supreme Court has held that the government may not prevent its publication on the front pages of this nation's leading newspapers. *United States v. N.Y. Times Co.*, 403 U.S. 713 (1971). Here, the government is seeking to suppress its own purposeful disclosure of classified information to defendants in a judicial proceeding to which the American public has a presumptive First Amendment right of access. It may not do so.

The government's remaining arguments in support of classification are no more persuasive. The government asserts the fact that the Executive Branch alone determines whether to classify information, and that the Supreme Court has held that classification decisions are due judicial deference. Gov't Resp. 10 (citing *Dep't of Navy v. Egan*, 484 U.S. 518 (1988) and *CIA v. Sims*, 471 U.S. 159, 169 (1985)). Neither *Egan* nor *Sims* even remotely contemplates the use of classification authority in the radical manner the government asserts in these proceedings, however. *Egan* concerns the Executive Branch's discretion to deny a security clearance to an individual who sought to access information that was concededly properly classified; here, the propriety of the government's classification must be reviewed by this commission, and the government itself acknowledges that it disclosed the information to prisoners who did not have (and surely have never sought) a security clearance. *Sims* addressed the question of the scope of National Security Act's protection of an intelligence source from compelled disclosure, and made clear that the CIA may withhold only information about sources or methods that "fall within the Agency's mandate." 471 U.S. at 169. Because the CIA's so-called "enhanced interrogation techniques" are illegal and have been categorically prohibited by the President, and its overseas detention and interrogation facilities have

been permanently closed, neither is within the Agency's mandate. Exec. Order No. 13,491, 74 Fed. Reg. 4893 (Jan. 22, 2009). Although *Sims and Egan* both acknowledge that courts owe some deference to Executive Branch classification decisions, it is also true, in a variety of contexts, that courts—including military courts—nevertheless review the propriety of those decisions, as this commission must do. *See United States v. Grunden*, 2 M.J. 116, 121–23 & n.14 (C.M.A. 1977) (proceedings may be closed only after court determines that information is properly classified and "determine[s] whether a particular classification was done in an arbitrary and capricious manner, thereby compelling its disclosure"); *United States v. Lonetree*, 31 M.J. 849, 854 (N-M.C.M.R. 1990), *aff'd in part*, 35 M.J. 396 (C.M.A. 1992) (military trial judge appropriately "conducted [his] own analysis of the affidavits and the interests at stake" in assessing whether the government had "set[] forth valid reasons for the classification of the information and why it could not be revealed in public session"); *see also, e.g.*, *Wilson v. CIA*, 586 F.3d 171, 185–86 (2d Cir. 2009) (requiring courts "to ensure that the information in question is, in fact, properly classified").

It is a dark and shameful irony of the government's own creation that even as it tells this commission and the public that "the government has a strong interest in ensuring public access to these historic proceedings" so it can demonstrate that "the accused receives stronger protections than an accused in many respected criminal-justice systems around the world," Gov't Resp. 7, it asks this commission to collude with it in an unprecedented effort to classify improperly and suppress detainees' accounts of government torture and secret detention. This military commission should reject the

government's legally impermissible and morally abhorrent classification claim, and not further undermine the already-contested legitimacy of this entire historic trial.

C. The Government Fails to Show that its Proposed Blanket Suppression of Defendants' Personal Accounts of Government Misconduct Satisfies the First Amendment's Searching Standards.

The government's mere assertion that classified information may—or even will—be disclosed during these proceedings does not satisfy the First Amendment strict scrutiny standard. Gov't Mot. 8–11; *In re Wash. Post Co.*, 807 F.2d at 391–92 ("[T]roubled as we are by the risk that disclosure of classified information could endanger the lives of both Americans and their foreign informants, we are equally troubled by the notion that the judiciary should abdicate its decision-making responsibility to the executive branch whenever national security concerns are present."); *see also N.Y. Times Co.*, 403 U.S. at 719 (Black, J., concurring) ("The word 'security' is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment.").

Even if this commission were to find that the government's classification of all or even some of defendants' statements about their own treatment in government custody is proper, the commission must determine whether the government has met its First Amendment burden of showing, based on factual evidence, that (1) the disclosure of specific information would result in a substantial likelihood of harm to a compelling government interest, (2) no means other than closure can avoid the specific threatened harm, (3) closure would effectively prevent the harm, and (4) closure is narrowly

tailored.[3] *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 582–84 (1980); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510 (1984) ("*Press-Enterprise I*"); *Press-Enterprise II*, 478 U.S. 1 at 13–14; *Lugosch v. Pyramid Co. of Onodaga*, 435 F.3d 110, 123–24 (2d Cir. 2006); *United States v. Hershey*, 20 M.J. 433, 436 (C.M.A. 1985).

On its face, the government's blanket request for the presumptive closure of the proceedings in order to suppress detainees' accounts of their detention and interrogation does not meet the first three requirements of the First Amendment right-of-access test.

In addition, the government's primary defense of its continued classification and presumptive suppression of defendants' statements—its assertion that "many details that relate to the capture, detention, and interrogation of the accused" remain classified, Gov't Resp. 12—is squarely refuted by the government's own declassified disclosures, which reveal in concrete and meticulous detail how the CIA applied so-called "enhanced interrogation techniques" against defendants, and even how the CIA exceeded the authority it was given to apply those techniques. ACLU Mot. 24–31. It is also undercut by the vast number of press accounts and reports of official U.N. and European government investigations that further describe the government's use of torture and abuse against defendants, as well as the foreign detention sites in which it held defendants. ACLU Mot. 24–31; Press Objectors' Mot. 21–26. The government argues that to the extent these press and other accounts are based on classified information that is leaked into the public domain, that information is not automatically declassified and cannot be further disclosed unless the government officially acknowledges it. Gov't Resp. 13.

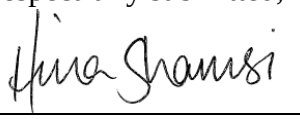
[3] The government's claim that the ACLU is attempting "to substitute its judgment" for that of the government is disingenuous. Gov't Resp. 12, 13. As the ACLU's motion makes abundantly clear, it is this commission which must subject the government's proposed grounds for closing these proceedings to the First Amendment strict scrutiny test.

Although that is an accurate statement of the "official acknowledgement" doctrine, leaks and other "unofficial disclosures," either by the press or other sources, do lessen the harm caused by further unofficial disclosure, a factor this Court must take into account in the First Amendment right-of-access balancing test. Moreover, if any of defendants' accounts of their treatment in government custody constitute new and uncorroborated allegations, their discussion in open court would not require official confirmation of any government program, intelligence method, or interrogation technique. Disclosure in open court would be little or no different from the widespread public disclosure of the leaked report of the International Committee of the Red Cross, detailing interviews with 14 former CIA detainees, including each of the defendants in this case. Int'l Comm. of the Red Cross, *Report on the Treatment of Fourteen "High Value" Detainees in CIA Custody* (Feb. 2007), *available at* http://assets.nybooks.com/media/doc/2010/04/22/icrc-report.pdf. Finally, the government does not contest—nor could it—that the CIA's detention and interrogation program has now been banned and is prohibited by law, ACLU Mot. 21–24, further undermining its claim that sources and methods the government currently uses to defend against terrorism would be threatened if disclosed.

The fact that the automatic and presumptive 40-second audio delay is not a narrowly tailored restriction on the public's right of access is clear from the very first hearing in these proceedings, defendants' May 5, 2012 arraignment. According to the government, the arraignment audio transmission "was briefly suspended for approximately 60 seconds," but the government later determined that the censored information was not actually classified, and then released a full transcript. Gov't Resp. 9. Not only does the First Amendment require contemporaneous and timely access,

Lugosch, 435 F.3d at 126–27, but the government's censorship was a classic prior restraint of speech—the government restricted speech before it was made public—which is "the most serious and the least tolerable infringement on First Amendment rights." *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). That the censorship turned out to be unnecessary further demonstrates that presumptive classification, as implemented through the 40-second audio delay, is the complete opposite of the case-by-case determination, based on specific factual findings, that the First Amendment requires before the public's right of access to judicial proceedings may be suppressed.

Respectfully submitted,



Hina Shamsi
Nathan Freed Wessler
Zachary Katznelson
American Civil Liberties Union Foundation
125 Broad St., 18th Fl.
New York, NY 10004
Tel.: (212) 549-2500
Fax: (212) 549-2654
hshamsi@aclu.org